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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE STATE OF CALIFORNIA,

Petitioner,

v.

RICHARD SCHUSTER, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

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QUESTIONS PRESENTED

1. DOES TALLEY v. CALIFORNIA (1960) 362 U.S. 60, NECESSARILY PRECLUDE A STATE FROM PASSING A STATUTE PROHIBITING ANONYMITY AS TO ALL CAMPAIGN LITERATURE, WHERE THE PURPOSE OF THE STATUTE IS TO FURTHER THE COMPELLING STATE INTEREST IN ASSURING THE INTEGRITY OF ELECTIONS?

2. IS A STATE STATUTE UNCONSTITUTIONALLY OVERBROAD IF IT PROHIBITS ANONYMOUS CAMPAIGN LITERATURE OF BOTH PEJORATIVE AND NONPEJORATIVE TYPES?

3. IS A STATE STATUTE UNCONSTITUTIONALLY OVERBROAD IF IT PROHIBITS ANONYMITY AS TO ALL CAMPAIGN LITERATURE WHICH IS ELECTRICALLY OR MECHANICALLY REPRODUCED, WHERE THE PURPOSE OF THE STATUTE IS THE COMPELLING NEED TO ASSURE A TRUTHFULLY AND FULLY INFORMED ELECTORATE, AND PREVENT AND PROVIDE RECOURSE AGAINST LIBEL?

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

Petitioner, the State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division One, entered August 28, 1980, affirming the judgment of the Superior Court for Imperial County granting respondents' request for a writ of prohibition.

OPINIONS BELOW

The original opinion of the Court of Appeal, Fourth Appellate District, Division One is reported as Schuster v. Municipal Court (1980) 109 Cal.App.3d 887. A copy of that opinion appears as appendix A to this petition. The order of the California Supreme Court issued on December 10, 1980, refusing to grant a hearing in this case appears as appendix B to this petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code section 1257(3) to review a judgment of the California Court of Appeal, Fourth Appellate District, Division One, which was entered August 28, 1980. The California Supreme Court denied a hearing in this case

on December 10, 1980. The present petition for writ of certiorari is filed within the required 60-day period following entry of final judgment. The judgment of the Court of Appeal became final for purposes of this Court with the denial of the hearing by the California Supreme Court on December 10, 1980. (Market Street R. Co. v. Comm'n. (1945) 324 U.S. 548, 550-552.) Thus, the instant judgment is a final decision rendered by the highest court of the State of California, interpreting rights under the United States Constitution.

QUESTIONS PRESENTED

1. Does Talley v. California (1960) 362 U.S. 60, necessarily preclude a state from passing a statute prohibiting anonymity as to all campaign literature, where the purpose of the statute is to

further the compelling state interest in assuring the integrity of elections?

2. Is a state statute unconstitutionally overbroad if it prohibits anonymous campaign literature of both pejorative and nonpejorative types?

3. Is a state statute unconstitutionally overbroad if it prohibits anonymity as to all campaign literature which is electrically or mechanically reproduced, where the purpose of the statute is the compelling need to assure a truthfully and fully informed electorate, and prevent and provide recourse against libel?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging

the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment XIV, in relevant part:

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

California Elections Code, section 29410, in relevant part:

"(a) Every person, other than a public officer in performance of an official duty, is guilty of a misdemeanor who causes to be reproduced by any mechanical or electrical means

including, but not limited to, printing, photocopying, mimeographing or silkscreening, any circular, pamphlet, letter, poster, bill, or other reproduced matter having reference to an election, to any candidate, or to any measure, or causes such reproduced matter to be posted or distributed, unless there appears on the circular, pamphlet, letter, poster, bill, or other reproduced matter in no less than six-point type not subjected to the halftone process the name and address of the business or residence of a person responsible for it.

"If the responsible person is acting on behalf of a campaign committee which has filed a statement of organization with the Secretary of State under the provisions of the Political Reform Act of 1974, as amended, the name and address to appear on the reproduced matter may be the name and address of the campaign committee."

STATEMENT OF THE CASE

A complaint filed in the municipal court of Imperial County charged Richard Schuster, Robert Simon and Melvin

Walter Lewis with violating Elections Code section 29410. On May 17, 1979, they sought a writ of prohibition in the Imperial County Superior Court after their demurrer to the complaint in the municipal court was overruled. (CT 1.)[1/] In the points and authorities filed in support of the petition, respondents challenged the constitutionality of section 29410 on several grounds, including vagueness and overbreadth. (CT 5-55.)

The Imperial County Superior Court concluded section 29410 was unconstitutionally overbroad because:

> "It would make criminal the reproduction or distribution of any writing having to do with 'an election' or a candidate without regard of the motive of the individual, or the contents of the writing." (CT 94.)

The People, petitioner herein, appealed.

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1. CT refers to the clerk's transcript.

By a published opinion filed on August 28, 1980, the Fourth District Court of Appeal, Division One, affirmed the superior court's decision. (See appen. A.)

Petitioner's application to the California Supreme Court for a hearing was denied on December 10, 1980. (See appen. B.)

ARGUMENT

I

THE CALIFORNIA COURT OF APPEAL HAS INCORRECTLY APPLIED TALLEY v. CALIFORNIA TO CAMPAIGN LITERATURE

Relying upon Talley v. California (1960) 362 U.S. 60, the California Court of Appeal, Fourth District, Division One, has declared Elections Code section 29410 unconstitutional as a violation of the First Amendment of the United States Constitution.

In Talley, this Court struck down as unconstitutional a Los Angeles City ordinance which forbade the distribution, in any place under any circumstances, of any handbill which did not have printed on it the name(s) and address of its sponsors, preparer or distributor.

The California Court of Appeal concludes Talley guarantees anonymity as an integral part of the freedom of speech, press and association, and Talley necessarily prohibits any exception for election materials:

> "The constitutional right to distribute anonymous literature acknowledged in Talley should include conduct of persons who wish to publish and distribute literature concerning candidates or issues in an election campaign. To distinguish Talley on the grounds that section 29410 applies only during election campaigns is to ignore the salutary influence of free and open debate at a time

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when it is probably needed the most." (Schuster v. Municipal Court (1980) 109 Cal.App.3d 887, 894.)

The California Court of Appeal has created an incorrect and overbroad interpretation of Talley. In refusing to distinguish between Talley's holding, which pertains to all anonymous literature, and the regulation only of anonymous campaign literature contained in Elections Code section 29410, the Court of Appeal erroneously concludes there is no distinction between First Amendment rights in general and First Amendment rights as they pertain to specific election procedures. This Court, however, has concluded otherwise. (Buckley v. Valeo (1976) 424 U.S. 1, 66-68.)

The Court of Appeal holds financial disclosure and lobbying cases

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like Buckley v. Valeo, supra, 424 U.S. 1, and United States v. Harriss (1954) 347 U.S. 612, are not applicable to any analysis of Elections Code section 29410 because they deal with campaign contributions and lobbying which involve attempts to prevent corruption, undue influence, and to inform the electorate. It concludes these interests are "neither present nor applicable to the case in controversy. Only the compelling state interest of an informed electorate is pursued by the enactment of section 29410." (Schuster v. Municipal Court, supra, 109 Cal.App.3d at pp. 898-899.) Petitioner disagrees.

The interests in this case and Buckley, supra, are identical: the prevention and detection of fraud and corruption in the election process. Section 29410 attempts to assure this through complete disclosure as to who is

saying what about whom. Financial and lobby disclosure acts prevent the same thing by requiring revelation of how much is being paid by whom. The interests of all of these laws is a fully, truthfully informed electorate. In fact, campaign literature disclosure, and financial/ lobby disclosure are complementary interests of every state. One is necessary to full implementation of the other. Financial disclosure laws obviously become more difficult to enforce if corporations and individuals can, with complete anonymity, defray the costs of preparing literature for candidates or causes, and can say anything they wish in the process. Moreover, it is the unpopular, minority view, the "unfinanced" view, which will suffer; not from the lack of anonymity, but ironically, because of anonymity.

The California Court of Appeal appears to believe disclosure on campaign literature is unnecessary. It quotes Justice Holmes' statement that ". . . 'the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" (Schuster v. Municipal Court, supra, 109 Cal.App.3d at p. 897; citing Abrams v. United States (1919) 250 U.S. 616.) Justice Holmes' statement was made in 1919, decades before the necessity of campaign disclosure laws. It offers an optimistic, but unreasonable approach to today's slick multimedia campaigns in which millions of dollars are invested; campaigns which can operate to stifle, not promote divergent and unpopular views.

Moreover, contrary to the Court of Appeal's conclusion, Talley does not

dispose of the issue here, i.e., whether a state violates the First Amendment if, in order to prevent dishonesty, fraud and libel, it prohibits anonymity in election literature. In holding the Los Angeles ordinance unconstitutional, this Court stated:

> "Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose. Therefore we do not pass upon the validity of an ordinance limited to prevent these or any other supposed evils." (Talley v. California, supra, 362 U.S. at p. 64, emphasis added.)

Thus, there has not yet been a definite statement from this Court on Talley's applicability to anonymous campaign literature. As a result, state and federal courts are now sharply divided on whether, and to what degree, Talley controls a state's ability to prohibit such anonymity.

Some courts, consistent with the California Court of Appeal herein, have refused to make any distinction between the subject matter sought to be regulated in Talley, and attempts to regulate campaign literature; concluding Talley necessarily controls such literature. (People v. Bongiorni (1962) 205 Cal.App.3d Supp. 856; State v. Fulton (La. 1976) 337 So.2d 866, 867-868; State v. North Dakota Ed. Ass'n. (D.N.D. 1978) 262 N.W.2d 731, 735.)

Other courts and justices have concluded that Talley is simply not applicable to election laws; reasoning instead that election law can be distinguished from the more general Los Angeles ordinance

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there held unconstitutional. (United States v. Insco (M.D.Fla. 1973) 365 F.Supp. 1308, 1311-1312, revd. on other grounds (5th Cir. 1974) 496 F.2d 204; State v. North Dakota Ed. Ass'n., supra, 262 N.W.2d at p. 738 (conc. and dis. opn. of Justice Sand).)

Still other courts have held the rationale of Talley permits narrowly drawn election laws designed for a legitimate governmental purpose. (Morefield v. Moore (Ky. 1976) 540 S.W.2d 873, 874; In re Opinion of the Justices (Del. 1974) 324 A.2d 211, 214; Canon v. Justice Court (1964) 61 Cal.2d 446, 449-450; United States v. Scott (D.N.D. 1961) 195 F.Supp. 440, 443-444.)

Several other courts have struck down election laws, opining that "perhaps" Talley would allow narrowly restricted

attempts to prohibit anonymous campaign literature. (Commonwealth v. Dennis (1975) 368 Mass. 92 [329 N.E.2d 706, 708-709]; People v. Duryea (1974) 76 Misc.2d 948 [351 N.Y.S.2d 978, 987-997, affd. 354 N.Y.S.2d 129].)

As a result of the inconsistent interpretations of Talley, election statutes whose scope is far broader than California Elections Code section 29410 have been upheld (United States v. Insco, supra, 365 F.Supp. 1308, prohibits anonymity with respect to anyone who publishes or distributes "any writing or other statement," and requires name of persons and/or associations responsible, plus names of all officers of the associations or committees; also see

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Morefield v. Moore, supra, 540 S.W.2d 873; United States v. Scott, supra, 195 F.Supp. 440), while at least one statue which is very similar in scope to Elections Code section 29410 has been struck down (State v. Fulton, supra, 337 So.2d 866 (statute required name of person responsible appear on printed, multigraphed, photographed, mimeographed election literature)).

Petitioner requests this Court grant certiorari in this case so that Talley's application, if any, to anonymous campaign literature can be clarified. Such clarification is necessary, even if section 29410 is unconstitutionally overbroad with respect to (1) its attempt to regulate pejorative and nonpejorative literature, or (2) its attempt to regulate literature produced by electrical and mechanical means. (See Arguments II and III, infra.)

The California Legislature cannot redraft Elections Code section 29410 until it is determined whether Talley absolutely protects anonymity with respect to all campaign literature. If it does, California would be engaging in an idle act in attempting to redraft the statute. Regardless of its content, the statute would be unconstitutional.

The confusion surrounding Talley's applicability to anonymous campaign literature affects a substantial number of states. Petitioner has not at this point endeavored a comprehensive survey of current disclosure laws. However, as of 1975, 43 states and the federal government imposed criminal sanctions upon persons who publish or distribute anonymous campaign literature. Most of those statutes cover all statements about candidates, not just personal attacks.

(See Developments in the Law of Elections (1975) 88 Harv.L.Rev. 1111, 1286-1288.)

Petitioner requests this Court grant certiorari in order to provide guidance on the important First Amendment question raised in this case.

II

THE CALIFORNIA COURT OF APPEAL INCORRECTLY HOLDS THAT A STATE MAY NOT PROHIBIT ANONYMOUS CAMPAIGN LITERATURE OF BOTH PEJORATIVE AND NONPEJORATIVE TYPES

The California Court of Appeal has found Elections Code section 29410 unconstitutionally overbroad and thus in violation of Talley v. California, supra, 362 U.S. 60, because it seeks to regulate both pejorative and nonpejorative campaign literature:

> "Section 29410 prohibiting anonymity in those areas untouched

> by the scope of former section 12047, namely laudatory comment, 'writings which are chiefly an expression of ideas' and 'impersonal criticism of [candidate's] views or official conduct' [citation], is just too broad. Its criminal sanctions apply to any references to any elections, even those of the past; to any references to any candidates regardless of nature, be it derogatory, laudatory or neutral; and to any references to any ballot measures regardless of truth." (Schuster v. Municipal Court, supra, 109 Cal.App.3d at pp. 895, 897-898.)

The California Court of Appeal approves People v. Bongiorni, supra, 205 Cal.App.2d Supp. 856 (Schuster v. Municipal Court, supra, at pp. 894-895), where the Appellate Department of the San Diego Superior Court concluded that although the Talley decision did not involve elections, its rationale operated so as to void Elections Code section 12049. Section 12049 required the names and address of sponsors appear on campaign literature designed to defeat or

promote a ballot measure. The court in Bongiorni, supra, was of the belief Talley required the disclosure statute define the type of statement or utterance prohibited. (People v. Bongiorni, supra, 205 Cal.App.2d Supp. at p. 857.) The court in Bongiorni found:

> "As the enactment [i.e., § 12049] is worded, it would be as much a violation to issue a handbill laudatory of a candidate as one that sought to damage his reputation. This court is unable to find sufficient distinction between the distribution of handbills generally and the distribution of handbills concerning elections to justify departure from the rule laid down by the United States Supreme Court [in Talley v. California, supra]." (Id.)

The State of California, petitioner herein, respectfully disagrees with the Court of Appeal's conclusion a state cannot require disclosure as to both pejorative and nonpejorative literature.

This Court has acknowledged there are certain governmental interests sufficiently important to outweigh potential infringement on First Amendment rights. (Buckley v. Valeo, supra, 424 U.S. at p. 66.) Thus, it has repeatedly held a compelling public need which cannot be met in a more restrictive way will override infringements on privacy and association, especially where the free functioning of government institutions is involved. (Nixon v. Administrator of General Services (1977) 433 U.S. 425, 467; Kusper v. Pontikes (1973) 414 U.S. 51, 58-59; Shelton v. Tucker (1960) 364 U.S. 479, 488.)

The California Court of Appeal acknowledges, as it must, that preserving the integrity of the electoral process by keeping voters truthfully informed is a

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compelling state interest. (Schuster v. Municipal Court, supra, 109 Cal.App.3d at pp. 895-896; Buckley v. Valeo, supra, 424 U.S. 1; Burroughs and Cannon v. U.S. (1934) 290 U.S. 543, 546; United States v. Harriss, supra, 347 U.S. at p. 625; Brown v. Superior Court (1971) 5 Cal.3d 509, 523.) The purpose of Elections Code section 29410 is to satisfy this need by guaranteeing a truthfully and fairly informed public, the most potent of all restraints on misgovernment. (Grosjean v. American Press Co. (1936) 297 U.S. 233, 250.) This purpose appears clearly in the legislative history of section 29410. (See Argument II, supra, at petn. p. 31.)

Unlike its predecessor statute, which required disclosure on derogatory comments only, section 29410 requires disclosure on both pejorative and non-pejorative material. The reason for this

is contained in the statute's history, where the California Legislature declared:

> "(e) That limiting identification requirements to pejorative campaign material is inadequate because subtle attacks on candidates or measures can be framed which appear to be supportive but, in fact, are pejorative." (Stats. 1977, ch. 976, § 1, p. 2948.)2/

By its finding, the California Legislature has determined that disclosure cannot be limited to pejorative materials without destroying the intent of the statute. It must be presumed the Legislature correctly performed its duty and ascertained the existence of this problem before passing the current version of section 29410.

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2. Even prior to this legislative statement, the California Supreme Court acknowledged the great difficultly involved in attempting to separate pejorative statements from nonpejorative statements. (Canon v. Justice Court, supra, 61 Cal.2d at p. 452.)

(Burroughs and Cannon v. U.S., supra, 290 U.S. at pp. 547-548; Cal. Democratic Council v. Arnebergh (1965) 233 Cal.App.2d 425, 430.)

Since the compelling need for truthful, honest campaign material cannot be met in a less restrictive way (i.e., by specifying motive and intent), the infringement on anonymity contained in Elections Code section 29410 is constitutionally permissible. (Nixon v. Administrator of General Services, supra, 433 U.S. at p. 467; Kusper v. Pontikes, supra, 414 U.S. at pp. 58-59.)

Contrary to the conclusion of the California Court of Appeal, Talley does not compel the conclusion that disclosure may be required on pejorative literature only. The ordinance in Talley was struck down not because it failed to expressly limit itself

to a particular state of mind. As this Court has carefully noted, it was struck down because in neither the ordinance nor its history could the court find any relationship between the asserted government interest and the scope of information sought to be disclosed. (Buckley v. Valeo, supra, 424 U.S. at p. 81; Hynes v. Mayor of Oradell (1976) 425 U.S. 610, 626, fn. 2 (conc. opn. of Justice Brennan).) Elections Code section 29410 does not suffer from this defect. (See Argument III, infra.)

To petitioner's knowledge, this Court has never struck down a state campaign disclosure statute on the ground it sought to regulate both pejorative and nonpejorative materials. Indeed, this Court has noted with apparent approval a federal election disclosure statute (18 U.S.C. § 12) which regulated both pejorative and nonpejorative

statements. (CSC v. Letter Carriers (1973) 413 U.S. 548, 567, fn. 13; Communist Party v. Control Board (1961) 367 U.S. 1, 97, fn. 39.) This same federal disclosure statute was cited with apparent approval by the California Supreme Court. Commenting on the federal case which approved the statute, the California court noted:

> "The statute was enacted, said the court, 'So that the electorate would be informed and make its own appraisal of the reason or reasons why a particular candidate was being supported or opposed by an individual or groups.' The court stressed that such disclosure enables voters to use their ballots more intelligently. It is to be noted that the federal statute is not limited in any manner as to the type of statement made." (Canon v. Justice Court, supra, 61 Cal.2d at pp. 453-454, fn. omitted, emphasis added.)

If this Court does not grant the petition for writ of certiorari, the State of California is placed in a wholly unsatisfactory dilemma. The California Legislature

has declared it cannot distinguish between pejorative and nonpejorative literature without nullifying the purposes for which Elections Code section 29410 was drafted. However, the California Court of Appeal has declared the First Amendment and Talley require such a distinction, and if such a distinction is not made the statute is unconstitutionally overbroad. This state must therefore choose between an ineffective disclosure statute or no statute at all. Neither choice is acceptable since under both the compelling need to assure truthful, honest campaigns goes unfulfilled.

Petitioner requests this Court grant its petition for writ of certiorari in order to eliminate this unsatisfactory and legally incorrect dilemma.

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III

THE CALIFORNIA COURT OF APPEAL HAS INCORRECTLY HELD ELECTIONS CODE SECTION 29410 IS UNCONSTITUTIONALLY OVERBROAD

California Elections Code section 29410 requires the name and address of the person or business responsible appear on the face of any electrically or mechanically reproduced matter having reference to an election, candidate or measure. Support statements such as "Yes on," "Vote for," or "Support" are exempted.

The California Court of Appeal concludes section 29410 regulates innocent as well as criminal activities and is therefore unconstitutionally overbroad. (Schuster v. Municipal Court, supra, 109 Cal.App.3d at pp. 894-895.) The State of California, petitioner herein, respectfully disagrees.

In its 1977 amendment to Elections Code section 29410, the Legislature declared:

> "(a) That a need exists for adequate identification of the source of campaign appeals directed at the voters in order to assist them in making rational decisions at the polls.
>
> "(b) That by requiring such identification of campaign literature, the public is better able to evaluate the source of campaign material, may be more adequately informed, and can better distinguish between truth and falsity.
>
> "(c) That by requiring identification, anonymous attacks, which cannot adequately be responded to in the heat of a campaign, will be discouraged.
>
> "(d) That by requiring identification, a candidate who believes he has been libeled may more readily seek redress in a civil action for damages." (Stats. 1977, ch. 976, § 1, p. 2948.)

The purpose of section 29410 is to preserve the integrity of the electoral process by keeping it rational, truthful and fair. As such, it furthers a compelling

and substantial governmental interest. (Burroughs and Cannon v. U.S., supra, 290 U.S. at p. 546; also United States v. Harriss, supra, 347 U.S. at p. 625.)

However, in any attempt to regulate disclosure in campaign literature, a state is faced with a most formidable task. On one hand it must not create a penal statute which is so broad that it is susceptible of sweeping and improper application. (N. A. A. C. P. v. Button (1963) 371 U.S. 415, 433.) On the other hand, it would be impossible meticulously to specify each and every instance of possible criminality. Unfortunately, a state must straddle these extremes by using the English language.

This Court has indicated that the difficulty in language usage must be taken into account when examining a statute for

overbreadth. (Grayned v. City of Rockford (1972) 408 U.S. 104, 110.) Courts should not strike down otherwise reasonable, constitutional statutes based upon remote or speculative hypotheticals. (United States v. Harriss, supra, 347 U.S. at p. 626.) It will always be true that the fertile legal imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be a nice question. (Communications Assn. v. Douds (1950) 339 U.S. 382, 412.)

The California Court of Appeal has declared Elections Code section 29410 overbroad on the grounds the statements and materials regulated exceed what is constitutionally permissible.[3/]

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3. The question of whether a state may regulate both pejorative and non-pejorative statements is discussed in Argument II, infra.

The court concludes:

> "Even the innocent, concerned citizen who wishes to share his knowledge at election time with others in the community will not be able to write an informed letter to the editor of the newspaper involving a candidate for any office, even for the local school board, and request that his name be withheld without fear of exposing himself and the newspaper to criminal liability." (Schuster v. Municipal Court, supra, 109 Cal.App.3d at p. 894.)

> "Its criminal sanctions apply to any references to any elections, even those of the past; to any references to any candidates regardless of nature, be it derogatory, laudatory or neutral; and to any references to any ballot measures regardless of truth." (Id., at p. 895.)

The State of California believes the disclosure required by Elections Code section 29410 is sufficiently restricted to withstand the argument it is overbroad.

In stating the intent of section 29410, the California Legislature declared it is regulating only "campaign appeals

directed at the voters" and thus requires identification on "campaign literature." (Stats. 1977, ch. 976, § 1, p. 2948; see petn. p. 31, supra.)

Contrary to the implication of the California Court of Appeal, Elections Code section 29410 regulates only "campaign literature," not literature about elections. The latter i. a much broader category than the former. Moreover, the characteristics of "campaign literature" are defined by the very terms used in section 29410.

The requirements of section 29410 apply only to the mechanical or electrical reproduction of circulars, pamphlets, letters, posters, bills, "or other reproduced matter." The doctrine of ejustdem generis declares this "list" of items be filled out with written materials that share the same characteristics as those listed. All of

the items listed are characterized by their quality of mass distribution through rapid reproduction. Items like books, high school term papers, and family newsletters would not fall under the classification of items governed by Elections Code section 29410.

The candidate and ballot measures to which section 29410 extends its protections are readily defined within a specific time frame. "Candidate" means, in common usage, a person seeking election to office. In the context of the Elections Code, it refers to a candidate for public office. Section 52 states that a person shall be a "legally qualified candidate . . . under the laws of this state" only if that person has properly filed or has completed other requirements. The California Supreme Court has expressed the opinion that "candidates" exist "only

during the period preceding an election." (Canon v. Justice Court, supra, 61 Cal.2d at p. 452, fn. omitted.) In addition, subdivision (d) of section 29410 states:

> "A copy of this Elections Code section and Section 84305 of the Government Code shall be provided by the clerk to each candidate or his agent at the time of filing the declaration of candidacy and to the proponents of a local initiative or referendum at the time of filing the petitions."

Subdivision (d) thus indicates the provisions of section 29410 become effective and are limited to pending elections only, i.e., that point in time in which there exist qualified candidates and qualified ballot measures.

The concerns expressed and hypothetical cases posed by the California Court of Appeal are thus unwarranted. Section 29410 is not concerned with past elections since there no longer exist candidates or

ballot measures. Moreover, there is no state interest in regulating comment on past elections since any danger to the integrity of the electoral process has passed. Nor could Elections Code section 29410 be concerned with future elections for which candidates have not yet filed and qualified, or ballot measures which have not yet been filed and qualified. Nor do persons who campaign as unannounced candidates in advance of an election fall within the protective scope of section 29410.

"Campaign literature," the only literature for which section 29410 creates a prohibition on anonymity, exists where an individual (or organization) who exercises the distribution control over material (1) relating to a declared candidate or current election (2) electrically or mechanically reproduces that material for mass consumption.

Both temporally and in terms of subject matter, this is a very narrow range of conduct and statements for which disclosure is required.

Since the general class of offenses to which the statute is directed is plainly within its terms, Elections Code section 29410 should not be struck down as unconstitutionally overbroad, even though some marginal case might arouse doubts. (United States v. Harriss, supra, 347 U.S. at pp. 617-618, 626.) This is true especially where, as here, respondents have not demonstrated harm will befall them if their identities must be made known. (Buckley v. Valeo, supra, 424 U.S. at p. 74.)

Even if section 29410 suffers from overbreadth, existing law is inconsistent and provides no guidance for determining how specific a campaign literature

disclosure statute must be to pass constitutional scrutiny.

The lack of standards in statutes regulating disclosure in campaign literature is apparent when one examines the wide variety of laws on the subject. The materials regulated have ranged from "any writing or other statement" (United States v. Insco, supra, 365 F.Supp. 1308) to combinations of specified literature like newspapers, magazines, circulars, posters, handbills, letters and television ads (cf. Morefield v. Moore, supra, 540 S.W.2d 873; State v. North Dakota Ed. Ass'n., supra, 262 N.W.2d 731; State v. Fulton, supra, 337 So.2d 866). Other states, like California, have attempted to confine the materials regulated to those meant to be distributed in quantity. (Cal. Elec. Code, § 29410; People v. Duryea, supra, 351 N.Y.S.2d 978.) The statements

regulated also vary. Some jurisdictions have limited disclosure to all statements (pro, con and neutral) about candidates for particular offices (United States v. Scott, supra, 195 F.Supp. 440; United States v. Insco, supra, 365 F.Supp. 1308), others have attempted to do just the opposite; limiting the statements regulated to those in support or against, but with regard to candidates for all offices, and even ballot measures (Morefield v. Moore, supra, 540 S.W.2d 873; State v. North Dakota Ed. Ass'n., supra, 262 N.W.2d 731). At least one state sought to regulate all statements about all candidates and all ballot measures. (People v. Duryea, supra, 351 N.Y.S.2d 978.) The persons whose identity must be revealed also varies. Some jurisdictions require disclosure of the name of the person or association responsible, plus one or more officers of the association,

and/or who is paying for the literature's production. (United States v. Insco, supra, 365 F.Supp. 1308; Morefield v. Moore, supra, 540 S.W.2d 873.) Others have sought disclosure only of the person or group responsible for paying for the printed material. (State v. North Dakota Ed. Ass'n., supra, 262 N.W.2d 731.) Still other attempts have been made to require disclosure of the printer's name and/or address. (People v. Duryea, supra, 351 N.Y.S.2d 978; Printing Industries of Gulf Coast v. Hill (S.D.Tex. 1974) 382 F.Supp. 801.)

An overview of the preceding authorities yields no clear standard for evaluating how specific a statute must be to escape being held overbroad. They are inconsistent. Moreover, the drafting of any one or more factors regulated (i.e., materials, statements or person(s) identified) has

resulted in statutes being declared unconstitutional. (People v. Duryea, supra, 351 N.Y.S.2d 978; State v. North Dakota Ed. Ass'n., supra, 262 N.W.2d 731; State v. Fulton, supra, 337 So.2d 866; Commonwealth v. Dennis, supra, 368 Mass. 92 [329 N.E.2d 706].) The Court of Appeal herein cites these cases with approval, and adds California to the ranks of those states which have disapproved of disclosure in campaign literature. (Schuster v. Municipal Court, supra, 109 Cal.App.3d at p. 899; cf. United States v. Insco, supra, 365 F.Supp. 1308; Morefield v. Moore, supra, 540 S.W.2d 873; United States v. Scott, supra, 195 F.Supp. 440.)

A substantial number of states have enacted disclosure laws for campaign literature (see Argument I, supra, at p. 19); obviously demonstrating a compelling need to prohibit anonymity in such materials. Yet,

the number of courts which are disapproving such legislation as unconstitutionally overbroad is growing.

This Court has not had occasion to rule upon the degree of certainty required in state statutes which attempt to prohibit anonymous election literature. Such comment is now necessary.

This Court should grant the petition for writ of certiorari in order to declare Elections Code section 29410 constitutional, and at the same time provide a standard which will end the inconsistent results in jurisdictions which have drafted such disclosure statutes.

IV

THE OPINION BELOW IS BASED UPON FEDERAL CONSTITUTIONAL AUTHORITY

The instant decision of the California Court of Appeal rests entirely

upon interpretation of the First Amendment of the United States Constitution, and this Court's opinion in Talley v. California, supra, 362 U.S. 60. Those cases which are cited from California and other jurisdictions involve, and are offered in support of, the court's interpretation of Talley and the First Amendment.

The Court of Appeal notes, almost in passing, that article I, section 2, of the California Constitution affords protection "more definitive and inclusive than the First Amendment." (Schuster v. Municipal Court, supra, 109 Cal.App.3d at pp. 893, 899, fn. 3.) It states, "Moreover, our decision also rests on article I, section 2, of the California Constitution." However, for purposes of the issues involved in this case, the California Court of Appeal has clearly interpreted the federal and state Constitutions as coextensive.

There is no discussion at all as to how, or if, the issues involved would be resolved any differently under the California Constitution. The opinion below clearly does not rest on independent state grounds.

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CONCLUSION

For the foregoing reasons, petitioner submits that a writ of certiorari should be issued to review the decision of the California Court of Appeal.

Respectfully submitted,

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79PA0023
02/04/81

A P P E N D I X "A"

[Filed August 29, 1980]

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE
4 CIV. NO. 22008
(Sup.Ct.No. 2249)

RICHARD SCHUSTER, et al.,

Petitioner and Respondents,

v.

IMPERIAL COUNTY MUNICIPAL COURT, et al.,

Defendant and Respondent,

v.

THE PEOPLE,

Real Party in Interest and Appellant.

APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF IMPERIAL COUNTY. Don R. Work, Judge. Affirmed.

Anthony L. Miller, Richard B. Maness and William P. Yee, on behalf of Real Party in Interest and Appellant.

Joseph C. Daly, Jr., for petitioner and respondent.

Margaret C. Crosby, Alan L.Schlosser, Amitai Schwartz and Fred Okrand as Amici Curiae on behalf of respondents.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Daniel J. Kremer, Assistant Attorney General, Richard D. Garske and Patricia D. Benke, Deputy Attorneys General, Attorneys for Real Party in Interest and appellant.

The question presented here is whether the provisions of Election Code section 29410, prohibiting all anonymous political campaign literature, is constitutional.1/ We decide the statute

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1. All references unless specified are to the Election Code. Section 29410 reads in part as follows:

> "(a) Every person, other than a public officer in performance of an official duty, is guilty of a misdemeanor who causes to be reproduced by any mechanical or electrical means including, but not limited to, printing, photocopying, mimeographing, or silkscreening, any circular, pamphlet, letter, poster, bill, or other reproduced matter having reference to an election, to any candidate, or to

(cont.)

constitutes on its face an unconstitutionally overbroad restraint of freedom of expression contrary to the First Amendment of the United States Constitution and Article I,, section 2, of the California Constitution.2/ We affirm the judgment granting a writ of prohibition restraining

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(Footnote 1 cont.)

> any measure, or causes such reproduced matter to be posted or distributed, unless there appears on the circular, pamphlet, letter, poster, bill, or other reproduced matter in no less than six-point type not subjected to the halftone process the name and address of the business or residence of a person responsible for it.
>
> "If the responsible person is acting on behalf of a campaign committee which has filed a statement of organization with the Secretary of State under the provisions of the Political Reform Act of 1974, as amended, the name and address to appear on the reproduced matter may be the name and address of the campaign committee."

2. Article I, section 2, of the California Constitution reads as follows:

> "SEC. 2. Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

further criminal proceedings for alleged violations of the statute.

I

A complaint filed in the municipal court charged petitioners Richard Schuster, Robert Simon and Melvin Walter Lewis with violating section 29410. They sought a writ of prohibition in the superior court after their demurrer to the complaint in the municipal court was overruled. Their petition was granted. The People appeal. (Code Civ. Proc., §§ 904.1, 1110.)

II

Section 29410 compels disclosure on the face of any writing "having reference to an election, or any candidate, or to any measure" of the name and address of the individual "responsible for it." In essence, it constitutes a prohibition of all anonymous political campaign literature, exempting only support statements such as "Yes on," "Vote for" or "Support." Even with the enumerated exemptions, the statute prohibits all anonymous literature which set forth any arguments, information or ideas in support or in opposition to candidates or ballot measures.

The statute, in attempting to regulate political speech, touches the core of First Amendment protection. The First Amendment exists to protect free discussion of governmental affairs (Mills v. State of Alabama (1966) 384 U.S. 214, 218 [86 S.Ct. 1434, 1437]), for "speech concerning public affairs is more than self-expression; it is the essence of self-government." (Garrison v. State of Louisiana (1964) 379 U.S.64,

74-75 [85 S.Ct. 209, 216].) The constitutional safeguard was fashioned "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (Roth v. United States (1957) 354 U.S. 476, 484 [77 S.Ct. 1304, 1308]; New York Times Co. v. Sullivan (1964) 376 U.S. 254, 269 [84 S.Ct. 710, 720]; see Hardie v. Eu (1976) 18 Cal.3d 371, 376.)

"First Amendment freedoms are not only protected from patent restraints, but also from more subtle forms of governmental interference." (Huntley v. Public Util. Com. (1968) 69 Cal.2d 67, 72; see Britt v. Superior Court (1978) 20 Cal.3d 844, 852.) Since disclosure requirements undoubtedly tend to restrict the freedom to distribute and consequently deter free speech, the latter right encompasses the right to remain anonymous. (Talley v. State of California (1960) 362 U.S. 60, 64 [80 S.Ct. 536, 538]; Huntley v. Public Util. Com., supra, 69 Cal.2d at p. 73.) Indeed, "[t]he proposition that, under certain circumstances, anonymity is essential to the exercise of constitutional rights is not a novel one. 'Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.' (N.A.A.C.P. v. Alabama (1958) 357 U.S. 449, 462 [2 L.Ed.2d 1488, 1499-1500, 78 S.Ct. 1163]; Britt v. Superior Court, supra, 20 Cal.3d at p. 853.)" (Ghafari v. Municipal Court (1978) 87 Cal.App.3d 255, 260.) Further, "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from

time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." (Talley v. State of California, supra, 362 U.S. at p. 64.)

The close relationship of free speech to the political process in this state, emphasized by our state Supreme Court in Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899, 907-908, has recently been confirmed by the United States Supreme Court in Pruneyard Shopping Center v. Robins (1980) ___ U.S. ___, ___ [100 S.Ct. 2035, 2040-2041]. Article I, section 2, of the California Constitution affords protection more definitive and inclusive than the First Amendment. (Robins v. Pruneyard Shopping Center, supra, 23 Cal.3d 899, 908.)

The right of free speech whether under the state or federal Constitution is not absolute. (See Canon v. Justice Court (1964) 61 Cal.2d 446, 457.) The exercise of that right must be compatible with the preservation of other essential rights in a free society which enjoy competing interests. (See Pennekamp v. State of Florida (1946) 328 U.S. 331, 352-355 [66 S.Ct. 1029, 1040-1042] conc. opn. of Frankfurter, J.).) Thus, "[w]here a government restricts the speech of a private person the state action may be sustained only if the government can show the regulation is a precisely drawn means of serving a compelling state interest. [Citation.]" (Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York (June 20, 1980) ___ U.S. ___ [48 L.Ed. 4776, 4778]; see also, People v. Glaze (Aug. 7, 1980) ___Cal.3d ___ [Crim. No. 21123, 80 Daily Journal DAR 2275].)

The state cannot pursue its legitimate purpose "by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. (Shelton v. Tucker (1960) 364 U.S. 479, 488 [81 S.Ct. 247, 252]; N.A.A.C.P. v. Alabama (1964) 377 U.S. 288, 307-308 [84 S.Ct. 1302, 1314]; Britt v. Superior Court, supra, 20 Cal.3d 844, 856.) We conclude this to be an appropriate case to weigh the magnitude of the state interest against the statute's encroachment upon First Amendment freedom.

III

The United States Supreme Court has, on numerous occasions, struck down requirements of disclosure where there was either a failure to establish a compelling state interest and/or a failure to establish a relationship between a compelling interest and the announced method of securing it. The court has declared unconstitutional the requirement that names and addresses of sponsors be printed on handbills (Talley v. State of California, supra, 362 U.S. 60), the requirement that organizations disclose membership lists (Gibson v. Florida Legislative Investigation Com. (1963) 372 U.S. 539 [83 S.Ct. 889]; Louisiana v. National Ass'n For Adv. of Col. People (1961) 366 U.S. 293 [81 S.Ct. 1333]; Bates v. City of Little Rock (1960) 361 U.S. 516 [80 S.Ct. 412]; National Ass'n for A. of C. P. v. State of Alabama (1958) 357 U.S. 449 [78 S.Ct. 1163]); and the requirement that individuals disclose organizational membership (Shelton v. Tucker (1960) 364 U.S. 479 [81 S.Ct. 247]).

Talley v. California, supra, 362 U.S. 60, involved a Los Angeles ordinance

banning distribution of handbills which did not state the names of the author and distributor. In holding the ordinance facially unconstitutional the Supreme Court recognized the importance of anonymity for protecting free speech. In spite of this firm grounding of a right to anonymity as an integral part of the guarantee of freedom of speech, freedom of the press and freedom of association under our state and federal constitutions, section 29410 criminalizes the exercise of this right with respect to any political campaign literature. In California, proponents of unpopular causes and members of controversial organizations must proclaim their individual identities along with their ideas.

The constitutional right to distribute anonymous literature acknowledged in Talley should include conduct of persons who wish to publish and distribute literature concerning candidates or issues in an election campaign. To distinguish Talley on the grounds that section 29410 applies only during election campaigns is to ignore the salutary influence of free and open debate at a time when it is probably needed the most. (See Monitor Patriot Co. v. Roy (1971) 401 U.S. 265, 272-273 [91 S.Ct. 621, 625-626].) Even the innocent, concerned citizen who wishes to share his knowledge at election time with others in the community will not be able to write an informed letter to the editor of the newspaper involving a candidate for any office, even for the local school board, and request that his name be withheld without fear of exposing himself and the newspaper to criminal liability. As fatigued as we may be with the numbing rhetoric of political campaigns and elections,

free discussion during these important times should not be restricted if we are to maintain a free government of free and informed people.

Relying on Talley, the Appellate Department of the San Diego Superior Court held former section 12049, prohibiting the distribution of anonymous election circulars and handbills pertaining to ballot measures, unconstitutional for the court was unable to distinguish between the distribution of handbills generally and those restricted to elections. (People v. Bongiorni (1962) 205 Cal.App.2d Supp. 856, 857.)

Our Supreme Court has had occasion to explore and comment upon the nuances of Talley. The constitutionality of former section 12047 was tested in Canon v. Justice Court, supra, 61 Cal.2d 446. That section prohibited the printing and distribution of anonymous writings "designed to injure or defeat any candidate for nomination or election to any public office by reflecting upon his personal character or political action, . . ." Although holding the statute unconstitutional on another ground, the court explained why it was satisfied that the statute overcame "the freedom of speech barricade." (Id., at p. 460.) The court stressed the narrow drafting of the statute which did not prohibit the communication of ideas nor the content of expression. (Id., at p. 451-452.) In Huntley v. Public Util. Com., supra, 69 Cal.2d 67, the court in expanding on its earlier statements noted that a limited impairment of freedom of speech was constitutionally permissible when it applied only to "(1) election campaigns (2) where the writing attacked a candidate (3) on a personal matter. Section 12047

reached irresponsible defamation of a candidate's personal life, an area not constitutionally protected [citation], and fostered free and truthful elections, an environment necessary to the intelligent exercise of suffrage [citation]." (Id., 69 Cal.2d at p. 75; see also Britt v. Superior Court, supra, 20 Cal.3d 844; Ghafari v. Municipal Court, supra, 87 Cal.App.3d 255, 260-262.)

Section 29410 prohibiting anonymity in those areas untouched by the scope of former section 12047, namely laudatory comment, "writings which are chiefly an expression of ideas" and "impersonal criticism of [candidate's] views or official conduct" (Canon v. Justice Court, supra, 61 Cal.2d at p. 452, fn. 6), is just too broad. Its criminal sanctions apply to any references to any elections, even those of the past; to any references to any candidates regardless of nature, be it derogatory, laudatory or neutral; and to any references to any ballot measures regardless of truth.

IV

Admittedly, the state has a compelling state interest in the integrity of the electoral process. "It is clear that the integrity of elections, essential to the very preservation of a free society, is a matter 'in which the State may have a compelling regulatory concern.' [Citation.]" Canon v. Justice Court, supra, 61 Cal.2d 446, 452-453.) The Legislature here, in attempting to promote this governmental interest, declared:

"(a) That a need exists for adequate identification of the source of

campaign appeals directed at the voters in order to assist them in making rational decisions at the polls.

"(b) That by requiring such identification of campaign literature, the public is better able to evaluate the source of campaign material, may be more adequately informed, and can better distinguish between truth and falsity.

"(c) That by requiring identification, anonymous attacks, which cannot adequately be responded to in the heat of a campaign, will be discouraged.

"(d) That by requiring identification, a candidate who believes he has been libeled may more readily seek redress in a civil action for damages.

"(e) That limiting identification requirements to pejorative campaign material is inadequate because subtle attacks on candidates or measures can be framed which appear to be supportive but, in fact, pejorative.

"(f) That a distinction needs to be made between campaign materials of small size that usually carry little more than a "Vote for _____" message, such as is often the case with buttons, matchbooks, pens, and the like, on the one hand, and campaign materials which carry more complex messages, on the other. In the

> case of the former, because of their characteristically small size and limited content, it would be an undue burden to require that identification as to source be included." (Stats. 1977, ch. 976, § 1, p. 2948.)

However, these legislative findings cannot sustain the sweeping impact of the regulation on protected speech.

Regarding source disclosure in order to assist the electorate in making rational decisions at the polls, this interest, although laudable, cannot justify in and of itself a blanket prohibition of all anonymous campaign literature.

> "Of course, the identity of the source is helpful in evaluating ideas. But 'the best test of truth is the power of the thought to get itself accepted in the competition of the market' (Abrams v. United States, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 [1919] [Holmes, J.].) Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is 'responsible', what is valuable, and what is truth." (People v. Duryea (1974) 351 N.Y.S.2d 978, 996.)

Further, considering the inevitable deterrent effect upon the exercise of free speech of compulsory disclosure, section

29410 will silence the voices of advocates of not only minority, but novel views, reducing the quantity and diversity of participants and perspectives within an election contest and thus frustrating the compelling state interest of obtaining an informed electorate (Brown v. Superior Court (1971) 5 Cal.3d 509, 524), while seriously infringing upon its right to receive divergent ideas.

Concerning the governmental interests of assisting the electorate in distinguishing between truth and falsity, facilitating redress for libel, and discouraging through criminal punishment campaign falsity, former section 12047 and the Talley and Canon decisions have taught us that such state interests can be furthered through more narrowly constructed statutes without the criminalization of anonymously uttering the truth. The failure of section 29410 to distinguish between protected and unprotected speech constitutes its crowning blow of unconstitutionality.

The People rely heavily upon the legislative finding that the limitation of disclosure requirements to pejorative campaign material is inadequate due to the often subtle difference between pejorative and nonpejorative political comment. Their reliance is misplaced. People v. Drake (1979) 97 Cal.App.3d Supp. 32, in holding section 29410 unconstitutionally overbroad, quite properly observed:

> "The problem is that, although the intent of this legislation is to create an undeceived, well-informed will of the people, it goes too far.

"For example, if one were to put out a typical campaign mailing stating that if Earl Warren were to be elected Governor of California, he would be one of the great governors in the history of the state, and if this campaign mailer were unsigned, the printer and/or the distributor of the pamphlet would be guilty of a misdemeanor under the provisions of section 29410. The statute is a flat prohibition of the creation or distribution of a class of written material regardless of the innocence of motive, the truth of the written material or the harmlessness of the activity. The mere unsigned reference to an election of a candidate or a measure on a ballot can, without more, be a crime under the terms of this statute. We see no compelling state interest that would justify criminalizing innocent activities along with injurious activities." (Id., at pp. 35-36.)

V

Finally, the reliance of the People and the Secretary of State upon case precedent upholding disclosure of campaign contributions and lobbying activities is misplaced. In Buckley v. Valeo (1976) 424 U.S. 1 [96 S.Ct. 612], the United States Supreme Court reviewed the constitutionality of the Federal Election Campaign Act, declaring in pertinent part the constitutionality of the compulsory disclosure requirements regarding campaign contributions

and expenditures. The court's conclusion rested upon the determination that the infringement upon the First Amendment freedoms of expression and association due to compulsory disclosure was outweighed by three specific compelling governmental interests furthered by the disclosure requirements. These interests included: (1) providing the electorate with information to aid them in evaluating candidates, (2) deterring "actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity," and (3) "gathering the data necessary to detect violations of the contribution limitations" of the act. (Id., at pp. 66-68.) All of these interests, however, are neither present nor applicable to the case in controversy. Only the compelling state interest of an informed electorate is pursued by the enactment of section 29410. Contribution disclosure cases such as Buckley v. Valeo, supra, Brown v. Superior Court, supra, 5 Cal.3d 509, and Socialist Workers etc. Committee v. Brown (1975) 53 Cal.App.3d 879, as well as decisions upholding the Federal Regulation of Lobbying Act (United States v. Harriss (1954) 347 U.S. 612 [74 S.Ct. 808]), and the Federal Corrupt Practices Act (Burroughs v. United States (1934) 290 U.S. 534 [54 S.Ct. 287]), all involve the necessity and thus the compelling governmental interest of guarding against the appearance and potential reality of undue influence and corruption inherent in financial contributions and lobbying activities. Section 29410 was not intended to address these matters. Rather, it is directed at pure speech involving political affairs (People v. Duryea, supra, 351 N.Y.S.2d at pp. 992, 997), which unlike the regulations scrutinized in Buckley v.

Valeo, supra, "is not narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." (State v. Fulton (La.1976) 377 So.2d 866, 871.)

VI

Our decision here is not singular or unique. Courts of other jurisdictions confronted with the identical issue have reached the same conclusion that a legislative prohibition of all anonymous campaign literature is unconstitutionally overbroad. (See People v. Duryea, supra, 351 N.Y.S.2d 978; State of North Dakota Ed. Ass'n (1978) 262 N.W.2d 731; State v. Fulton, supra, 337 So.2d 866; Commonwealth v. Dennis (Mass. 1975) 329 N.E.2d 706.)3/ The holdings of these cases as well as ours should not be startling. We continue as a country of laws and not of persons because of the premise firmly embedded in our state and federal

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3. We find the federal district court decisions of United States v. Scott (D. N.Dak.1961) 195 F.Supp. 440 and United States v. Insco (N.D. Fla.1973) 365 F.Supp. 1308, reversed on other grounds, (5th Cir. 1974) 496 F.2d 204, upholding the prohibition in 18 U.S.C. section 612 of anonymous campaign literature pertaining to candidates unpersuasive. Further, unlike section 29410, the federal statute is more narrowly drafted as it applies to only campaign literature concerning candidates and not to ballot measures. Moreover, our decision also rests on Article I, section 2, of the California Constitution.

constitutions that to stifle discussion is to menace the basic structure of our government. Section 29410 is unconstitutional because it encroaches upon this fundamental freedom."

Disposition

Judgment affirmed.

Wiener
J.

WE CONCUR:

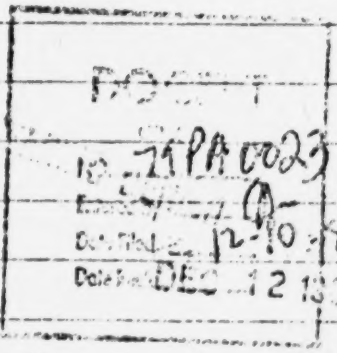
Brown
P.J.

Staniforth
J.

A P P E N D I X "B"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

I have this day filed Order _____



In re: 4 Civ. No. 22008

Schuster et al.

vs.

Imperial County Municipal Court, et al.

Respectfully,

Clerk

72076 877 7 79 4M OSP

AFFIDAVIT OF SERVICE BY MAIL

ATTORNEY:

George Deukmejian,
Attorney General
Patricia D. Benke,
Deputy Attorney General
110 West A Street, Ste. 700
San Diego, CA 92101

No. _____

STATE OF CALIFORNIA,

Petitioner,

v.

RICHARD SCHUSTER, ET AL.,

Respondents.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within-mentioned mailing occurred, and not a party to the subject cause; my business address is 110 West A Street, Suite 700, San Diego, California 92101.

I served the within PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE: an original and 39 copies on the United States Supreme Court as follows: Michael Rodak, Jr., Clerk, U.S. Supreme Court, Washington, D.C. 20543, of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Dated at San Diego, California, February 5, 1981.

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Subscribed and sworn to before me this 5TH day of FEBRUARY, 1981

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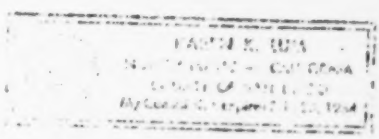

AFFIDAVIT OF SERVICE BY MAIL

No. 80-1366

IN THE

Supreme Court of the United States

October Term, 1980

THE STATE OF CALIFORNIA
Petitioner,

vs.

RICHARD SCHUSTER, et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Does this Court have jurisdiction to review a decision of the California Court of Appeal which was based on the free speech guarantee of the California Constitution as well as the First Amendment?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents RICHARD SCHUSTER, ROBERT SIMON and MELVIN WALTER LEWIS respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the California Court of Appeal, Fourth Appellate District, Division One.[1/]

JURISDICTION

Respondents assert that this Court has no jurisdiction to review this case because the decision of the California Court of Appeal was based on an adequate and independent state ground. Respondents' position will be fully presented in the Argumment below.

1/ The Petition for Writ of Certiorari will be hereafter cited as "Pet. at ___." The Court of Appeal's decision reported at 109 Cal.App.3d 887 (1980), is attached as Appendix A of the Petition, and will be hereafter cited as "Schuster, supra, 109 Cal.App.3d at ___; Pet. App. at ___."

CONSTITUTIONAL PROVISIONS INVOLVED[2/]

California Constitution, Article I, Section 2:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

STATEMENT OF THE CASE

The statement of the case in the Petition for Writ of Certiorari makes a counter-statement of these matters unnecessary. (Pet. at 6-8)

ARGUMENT

THIS COURT LACKS JURISDICTION BECAUSE THE DECISION OF THE CALIFORNIA COURT OF APPEAL WAS BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND

Petitioner's cursory discussion and strategic placement of the issue of whether the

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2/ The Petition only sets forth the First and Fourteenth Amendments to the United States Constitution and California Elections Code, Section 29410. (Pet. at 4-6)

decision of the California Court of Appeal was based on an adequate and independent state ground in the last three pages of its lengthy petition (Pet. at 44-46) should not divert this Court's attention from the specificity and clarity with which the Court of Appeal rested its decision on the California Constitution.

In striking down the blanket prohibition of anonymity in all campaign literature mandated by California Elections Code Section 29410, the Court of Appeal held that the statute was "on its face an unconstitutionally overbroad restraint of freedom of expression contrary to the First Amendment of the United States Constitution and Article I, Section 2 of the California Constitution." (Schuster, supra, 109 Cal.App.3d at 891; Pet. App. at A-3) At the conclusion of its opinion, the Court of Appeal reiterated that its decision was based on "the premise firmly embedded in our state and federal constitutions

that to stifle discussion is to menace the basic structure of our government." (Schuster, supra, 109 Cal.App.3d at 899; Pet. App. at A-16-17)

It is hard to imagine how a state court could more clearly declare that its decision rested on an independent state ground. Petitioner tries to characterize the decision as resting "entirely upon interpretation of the First Amendment of the United States Constitution, and this Court's opinion in Talley v. California, supra, 362 U.S. 60." (Pet. at 44-45); but even a cursory review of the opinion reveals the distortion in this characterization. As if to anticipate and refute in advance petitioner's statement to this Court that the decision "rests entirely upon interpretation of the First Amendment," the Court of Appeal clearly held that that "our decision also rests on Article I, Section 2 of the California Constitution." (Schuster, supra, 109 Cal.App.3d at

899, n. 3; Pet. App. at A-16, n. 3)

Equally incorrect is petitioner's assertion that the Court of Appeal decision was simply an interpretation of this Court's opinion in Talley v. California, 362 U.S. 60 (1960). The Court of Appeal explicitly relied on the consistent recognition of the constitutional protection for anonymous speech rendered in prior California decisions, such as: Canon v. Justice Court, 61 Cal.2d 446 (1964); Huntley v. Public Utility Commission, 69 Cal.2d 67 (1968); Britt v. Superior Court, 20 Cal.3d 844 (1978); and Ghafari v. Municipal Court, 87 Cal.App. 3d 253 (1978). (Schuster, supra, 109 Cal. 3d at 895; Pet. App. at A-9-10)[3/]

Once the fact that the decision below rested on the California Constitution as

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3/ Throughout its opinion, the Court of Appeal coupled citations to decisions of this Court with citations to California precedents. (Schuster, supra, 109 Cal.App.3d at 892-93; Pet. App. at A-5-7)

well as the United States Constitution is recognized, it is clear that this Petition for Writ of Certiorari must be denied. It is the "settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); accord, e.g., Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487, 491-92 (1956); Herb v. Pitcairn, 324 U.S. 117, 125-28 (1945); Enterprise Irrigation District v. Farmers' Mutual Canal Company, 243 U.S. 157, 164 (1917); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635 (1875).[4/]

4/ "And of course state courts that rest their decision wholly or even partly on state law...not only cannot be overturned by, they indeed are not even reviewable by, the

[Continued...]

In the face of this "settled rule" and the Court of Appeal decision, it is difficult to fathom petitioner's argument in favor of this Court's jurisdiction. Aside from its mischaracterization of the decision, petitioner's only other point is that the "California Court of Appeal has clearly interpreted the federal and state Constitutions as coextensive." (Pet. at 45) However, the independent state ground rule depriving this Court of jurisdiction is not dependent on the state constitution providing broader protection than the federal constitution, but rather clearly applies with full force even when both constitutions are similar in scope. E.g., Jankovich v.

4/ [Continued]

Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions." Brennan, "State Constitutions and the Protection of Individual Rights" 90 Harv.L.Rev. 489, 501 (1977); see Payton v. New York, 445 U.S. 573, 600 (1980).

v. Indiana Toll Road Comm'n, supra.[5/]

If petitioner's claim is that the Court of Appeal's ruling under Article I, Section

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5/ When faced with a California decision on equal protection grounds that, unlike the instant case, did not state whether it was based on the state or federal constitution, "or both," this Court vacated the decision for clarification by the California Supreme Court. Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 196, 201 (1965). On remand, the California Supreme Court made it clear that it had relied on both federal and state equal protection guarantees, which it believed provided "generally equivalent but independent protections...." Department of Mental Hygiene v. Kirchner, 62 Cal.2d 586, 588 (1965). Yet the Court's conclusion that the guarantees were "equivalent," or coextensive, did not in any way mitigate the presence of an adequate and independent state ground: "While it is our view that we should reach the same conclusion under the Fourteenth Amendment, we were (and we are) in any event independently constrained to the result we reached by sections 11 and 21, article I of the California Constitution." Id. See People v. Krivda, 8 Cal.3d 623 (1973), after remand, sub nom California v. Krivda, 409 U.S. 33 (1972); Rios v. Cozens, 9 Cal.3d 454 (1973), after remand sub nom, Department of Motor Vehicles v. Rios, 410 U.S. 425 (1973).

Of course, the clarification needed by this Court in Kirchner, Krivda and Rios, because of the lack of mention in the initial state court decisions of the state constitutional ground, is not needed in the instant

[Continued...]

2 was dependent upon or compelled by its interpretation of the First Amendment, then it is clear that petitioner has chosen the wrong state and the wrong state constitutional provision to make such an argument. In interpreting its state constitution, California courts have "led the nation in the development of independent interpretation." Note, "The New Federalism: Toward a Principled Interpretation of the State Constitution," 29 Stan.L.Rev. 297, 301 (1977). The California Supreme Court has clearly articulated the principle behind the independent character of the state constitution:

> [I]n the area of fundamental civil liberties -- which includes not only freedom from unlawful search and seizure but all protections of the California Declaration of Rights -- we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the

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5/ [Continued]

case, where the Court of Appeal several times explicitly stated its reliance on state constitutional grounds.

> national citizenry under the federal charter. In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. People v. Longwill, 14 Cal.3d 943 951, n. 4 (1975); accord, People v. Pettingill, 21 Cal.3d 231, 247 (1978)

This principle has been implemented in case after case in which the California Constitution has been the primary and independent basis for a judicial decision.[6/] The people of California approved this course

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6/ E.g., City of Santa Barbara v. Adamson, 27 Cal.3d 123 (1980) (right to privacy); Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899 (1979) (free speech in shopping centers); People v. Wheeler, 22 Cal.3d 258 (1978) (right to an impartial jury); People v. Pettingill, 21 Cal.3d 231 (1978) (privilege against self-incrimination); People v. Hannon, 19 Cal.3d 588 (1977) (right to speedy trial); Serrano v. Priest, 18 Cal.3d 728 (1976) (equal protection); Allen v. Superior Court, 18 Cal.3d 520 (1976) (self-incrimination); People v. Brisendine, 13 Cal.3d 528 (1975) (search and seizure); Burrows v. Superior Court, 13 Cal.3d 238 (1974) (protection of bank records); People v. Anderson, 6 Cal.3d 628 (1972) (death penalty held violative of state ban on cruel or unusual punishment); People v. Cahan, 44 Cal. 2d 434 (1955) (adopting the exclusionary rule later adopted by the United States

[Continued...]

of judicial independence and embodied it into the California Constitution in 1974 by adding a constitutional provision which explicitly reaffirms that state constitutional rights "are not dependent on those guaranteed by the United States Constitution." Calif. Const., Article I, Section 24. Finally, this Court recently recognized approvingly the independent status of rights guaranteed under the California Constitution. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

Furthermore, this principle of independent interpretation has been explicitly applied to Article I, Section 2 of the California Constitution, the independent state ground invoked in the instant case. It is clear that the state free speech guarantee is a "protective provision more

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6/ [Continued]

Supreme Court and ultimately made applicable to the states).

definitive and inclusive than the First Amendment...." Wilson v. Superior Court, 13 Cal.3d 652, 658 (1975); Robins v. Pruneyard, 23 Cal.3d 899, 908 (1979), aff'd 447 U.S. 74 (1980); People v. Glaze, 27 Cal. 3d 841, 844, n. 2 (1980).[7/]

Significantly, the independent and more protective character of Article I, Section 2 was first clearly articulated in a case in which it was relied on by the California Supreme Court to invalidate an injunction that was claimed necessary to prevent "the circulation of misleading

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7/ The independent scope of Article I, Section 2 is emphasized by the difference between its wording and that of its federal counterpart. The First Amendment is a terse, restrictive mandate:

> Congress shall make no law... abridging the freedom of speech, or of the press...."

Article I, Section 2 goes further:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

[Continued...]

charges against a candidate [which] interferes with the democratic voting process." Wilson v. Superior Court, supra, 13 Cal.3d at 660. Thus, the California Supreme Court has already made it clear that Article I, Section 2's broader protection is applicable in considering the same "compelling" interests that petitioner is asserting in the instant case. (Pet. at 24); see, Loza v. Panish, 102 Cal.App.3d 821, 824 (1980)

By explicitly citing and relying in its opinion on these precedents establishing the "more definitive"scope of Article I, Section 2, the Court of Appeal was making it quite clear that it was striking down Elections Code Section 29410 on an adequate

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7/ [Continued]

The addition of an affirmative right to "freely speak, write and publish" by the drafters of the California Constitution underscores the independent status of Article I, Section 2. Robins v. Pruneyard Shopping Center, supra, 23 Cal.3d at 908.

and quite independent state ground. (Schuster, supra, 109 Cal.App.3d at 892-93; Pet. App. at A-6)

The instant case perfectly illustrates the wisdom of this Court's "settled rule" of declining jurisdiction when the state Court decision rests on an adequate and independent state ground. The rationale behind the rule was delineated in Herb v. Pitcairn, supra, 324 U.S. at 125-26:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

In view of the clearly independent and more protective scope of Article I, Section 2, and in view of the Court of Appeal's unmistakable reliance on that provision in its decision, if this Court were to grant

certiorari in the instant case and to adjudge the constitutionality of Elections Code Section 29410 under the First Amendment, the resulting decision would be purely "advisory" and hypothetical with respect to California. For even if this Court were to accept petitioner's arguments and conclude that Section 29410 does not violate the First Amendment, the statute would still be violative of the "more protective" provisions of Article I, Section 2 of the California Constitution, "thus leaving the result untouched by whatever conclusions this Court might have reached on the merits of the federal question." Department of Mental Hygiene v. Kirchner, supra, 380 U.S. at 197.[8/]

8/ The Court of Appeal made this quite clear in its opinion. In discussing a federal campaign disclosure statute that had been upheld by a federal district court as not violative of the United States Constitution, the Court of Appeal stated that it disagreed

[Continued...]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: March 3, 1981

Respectfully submitted,

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8/ [Continued]

with the federal court decision, and that in any case the federal statute was narrower than Section 29410. The Court concluded its discussion as follows: "Moreover, our decision also rests on Article I, Section 2 of the California Constitution." (Schuster, supra, 109 Cal.App.3d at 899, n. 3; Pet. App. A-16, n. 3) In other words, even if the First Amendment would be interpreted to permit a prohibition of anonymous literature, the Court of Appeal would rule that a blanket prohibition violated the California Constitution. This is the very situation that this Court's jurisdictional rule was designed to forestall.

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Supreme Court, U.S.
FILED
MAR 30 1981
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CLERK

THE STATE OF CALIFORNIA,

Petitioner,

v.

RICHARD SCHUSTER, ET AL.,

Respondents.

PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION

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THE STATE OF CALIFORNIA,

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PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION

ARGUMENT

I

THIS COURT DOES HAVE JURISDICTION TO DECIDE THE ISSUES RAISED IN THIS CASE

Respondents urge this Court cannot grant petitioner's writ of certiorari because the opinion of the California Court of Appeal

rests on state grounds as well as federal grounds. In this case, petitioner feels respondents' argument must fail.

As respondents themselves note at page seven of their Brief in Opposition, this Court has stated that where the judgment of a state court rests upon two grounds, one federal and one state, its jurisdiction fails if "the non-federal ground is independent of the federal ground and adequate to support the judgment." (Fox Film Corp. v. Muller (1935) 296 U.S. 207, 210, emphases added.) However, the Court of Appeal's decision in this case does not fit within this classification.

A nonfederal ground should not be deemed "independent" of the state ground simply because in a footnote appearing at the end of its opinion, the

Court of Appeal has stated, "our decision also rests on article I, section 2, of the California Constitution." (Schuster v. Municipal Court (1980) 109 Cal.App.3d 887, 899, fn. 3.) Nor could such a passing reference qualify as "adequate to support the judgment." Nowhere in the opinion does the Court of Appeal state, or even imply, its opinion rests independently on state grounds. Its brief and passing reference to the California Constitution in an otherwise detailed recitation and interpretation of federal authority, clearly indicates the Court of Appeal has not rested its decision independently on the California Constitution.

Recently, in California v. Riegler (Feb. 5, 1981, No. A-659) ____ U.S.L. Week ____, on application for stay, Justice Rehnquist noted in determining if a stay

should be granted this Court would inquire into whether the order sought to be stayed is predicated on federal as opposed to state grounds. He concluded the order at issue did sufficiently raise a federal question because "The opinion refers specifically to the Fourth Amendment and relies for support on federal cases and state cases addressing the federal constitutional issue."

Here, the opinion of the California Court of Appeal is squarely premised on an interpretation of Talley v. California (1960) 362 U.S. 60. The Court of Appeal itself notes that those California cases which are cited in its opinion are cases which also interpret Talley. (Schuster v. Municipal Court, supra, 109 Cal.App.3d at p. 895.) Moreover, those cases which are cited from

other jurisdictions are cases which offer interpretations of Talley. (Schuster v. Municipal Court, supra, 109 Cal.App.3d at p. 899.) In short, the California Court of Appeal, while briefly mentioning the California Constitution, clearly never intended to rest its decision independently on state law.

To accept respondents' argument would mean this Court could not review any state decision which, while raising substantial federal issues and disposing of them by relying upon interpretations of this Court's opinions, mentions in passing that its opinion would be the same under the state's Constitution.

As the California Court of Appeal clearly recognized, the issues raised in this case are of substantial federal interest. It disposed of the

issues by use of this Court's opinions and state authorities interpreting those opinions.

This Court does have jurisdiction to review the issues presented.

II

THIS CASE SHOULD BE CONSIDERED IN CONJUNCTION WITH THE FINANCIAL DISCLOSURE CASES IN WHICH THIS COURT HAS NOTED JURISDICTION

The petition for writ of certiorari was filed in this case on February 5, 1981. On February 23, 1981, this Court noted jurisdiction in a California case: Citizens Against Rent Control v. City of Berkeley, 80-737.[1] The case raises questions concerning whether campaign limitation laws in California

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1. On the same day, this Court noted jurisdiction in two other cases which involve First Amendment rights as they relate to campaign disclosure: Federal Election Commission v. Americans For A Change, 80-1067; Common Cause v. Schmitt, 80-847.

violate First Amendment rights of speech and association.

In its petition for rehearing before the California Court of Appeal (exh. A, pp. 3-4)[2/], and its petition for hearing in the California Supreme Court (exh. B, pp. 24-25), petitioner cited the case of Citizens Against Rent Control v. City of Berkeley (1980) 27 Cal.3d 819, for the proposition that if financial disclosure laws are to be effective, the state must be permitted to require disclosure of those responsible for distributing campaign literature. As was noted in the petition for hearing filed in this case in the

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2. For the court's convenience, petitioner has included the pertinent parts of its petition for rehearing in California Court of Appeal and petition for hearing in the California Supreme Court as exhibits A and B, respectively. The petitions in their entirety are contained in the record below as 4 Civ. 22008.

California Supreme Court, if section 29410 is declared unconstitutional, an individual or corporation, who has reached its legal contribution limit, can then, through its organization or a "shield," make a further contribution by anonymously financing the printing of literature for or against a candidate or proposition. Moreover, the person may say what he wishes with impunity.

Indeed, with a cloak of total anonymity, the financial disclosure laws and policies underlying them can be totally ignored, thus totally emasculated. There would be no way of knowing who is financially responsible for any given literature "campaign," and thus, it would become very difficult to enforce expenditure limitations. (See exh. B, p. 25.)

/

Petitioner has asserted (petn. for writ of cert., p. 12) and continues to assert, that the full implementation and enforcement of financial disclosure laws depend upon personal disclosure statutes such as Elections Code section 29410.

Respectfully submitted,

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E X H I B I T "A"

Second, the requirements of section 29410 apply only to electrically or mechanically printed materials which are characterized by their quality of mass distribution (e.g., pamphlets, bills, letters).

Finally, as appellant has noted in its opening brief, the provisions of section 29410 protect only declared candidates and current elections. (AOB 28-31.) This Court's concern over past elections (Schuster, et al. v. Imperial County Municipal Court, et al., supra (Aug. 28, 1980, 4 Civ. 22008) ____ Cal.App.3d ____, slip opn., p. 10) is needless.

In summary, only "campaign literature" is governed by section 29410. Such literature exists where (1) an individual or organization who exercises distribution control over material, (2) relating to a declared candidate or current election, (3) mechanically or electrically reproduces that material for public consumption.

The scope of "campaign literature" covered by section 29410 is definable. It is not overbroad. A rehearing should be granted to properly construe the statute.

II Exh. A

IF SECTION 29410 IS DECLARED UNCONSTITUTIONAL, FINANCIAL DISCLOSURE AND LIMITATION LAWS THROUGHOUT CALIFORNIA WILL BE EMASCULATED

Financial limitation and disclosure laws such as those recently held constitutional by the California Supreme

Court in Citizens Against Rent Control v. City of Berkeley (Aug. 7, 1980, S.F. 24124) ____ Cal.3d ____, exist to prevent fraud and corruption in the election process. (Id., slip opn., pp. 14-19.)[1/] If section 29410 is declared unconstitutional, an individual or corporation who reaches the legal spending limit can then make a further contribution by launching an anonymous literature campaign by itself or through a "shield." There would be no way of knowing who is responsible for the campaign, and thus, there would be no way of effectively enforcing expenditure limitations.

A rehearing should be granted so the important social policies underlying the financial disclosure laws are not emasculated.

III

A REHEARING SHOULD BE GRANTED SO THAT A FULL CONSTITUTIONAL BALANCING TEST CAN BE APPLIED

As appellant pointed out in its opening brief (AOB 11-12, 26), those who would challenge a statutory disclosure requirement must present a record which demonstrates in fact or experience a reasonable probability the disclosure will cause some type of harm to the individuals or association

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1. Among local provisions directly affected are division 29 of the San Diego Municipal Code (spending limits for city candidates and ballot measures), and chapter 9, division 2, title 3 of San Diego County Code of Regulatory Ordinances (spending limitations on county candidates).

E X H I B I T "B"

In conclusion, only "campaign literature" is regulated by section 29410. Such literature exists where (1) an individual (or organization) who exercises the distribution control over material, (2) relating to a declared candidate or current election, (3) electrically or mechanically reproduces that material for mass consumption.

Section 29410 clearly gives a person of ordinary intelligence fair notice as to what type of conduct is forbidden. Since the general class of offenses to which the statute is directed is plainly within its terms, section 29410 should not be struck down as unconstitutionally overbroad, even though some marginal case might arouse doubts. (United States v. Harriss (1954) 347 U.S. 612, 617-618, 626.) This is so especially since, through construction, this Court can and should give constitutionally valid definitions to its terms, and limit its application to a constitutional scope. (Id.)

A hearing should be granted so that section 29410 can be properly construed.

II Exh. B

IF SECTION 29410 IS DECLARED UNCONSTITUTIONAL, THE FINANCIAL DISCLOSURE AND LIMITATION LAWS THROUGHOUT THIS STATE WILL BE EMASCULATED AND FREEDOM OF EXPRESSION WILL BE CURTAILED

In declaring section 29410 unconstitutional, the Court of Appeal permits and invites complete avoidance of

existing financial limitation laws, such as those recently held necessary and constitutional by this Court in Citizens Against Rent Control v. City of Berkeley (1980) 27 Cal.3d 819.

Financial disclosure and limitation laws, which are consistent with California's Fair Political Practices Act,[7] limit the amount of money which can be contributed in support of or opposition to candidates and ballot measures. Their purpose is to eliminate corruption and foster fair and honest elections.

If section 29410 is declared unconstitutional, an individual or corporation, who has reached its legal contribution limit, can then, through its organization or a "shield," make a further contribution by anonymously financing the printing of literature for or against a candidate or proposition. Moreover, the person may say what he wishes with impunity.

Indeed, with a cloak of total anonymity, the financial disclosure laws and policies underlying them (see id.) can be totally ignored, thus totally emasculated. There would be no way of knowing who is financially responsible for any given literature "campaign," and thus, there would be no way of enforcing expenditure limitations.

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7. California Government Code section 81000 et seq.

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

AFFIDAVIT OF SERVICE BY MAIL

Clifford E. Reed, Jr., being duly sworn, deposes and says: That affiant is over the age of 18 years, and not a party to the within action; that affiant's place of employment and business address is 110 West "A" Street, Suite 600, San Diego, California 92101; that on the 26 day of March, 19 81, affiant enclosed one true copy of the within

PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION
(State v. Schuster, No. 80-1366)

in an envelope for each of the persons named below, addressed to each of them at the address set out immediately below each respective name, sealed said envelope, and deposited the same in the United States Mail at the City of San Diego, County of San Diego, State of California, with postage thereon fully prepaid; that there is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the said place of mailing and each of the places so addressed.

That all parties required to be served have been served as shown below:

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Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 26th day of March,
19 81.

SHERI HATTEN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My Commission expires Nov. 7, 1981

NOTARY PUBLIC in and for the County of
San Diego, State of California.

SD CL-3 (11/78)